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How Criminal Justice Reforms Affect Regime Legitimacy

Bradley C. Canon*

***The State Politics of Judicial and Congressional Reform: Legitimizing Criminal Justice Policies* by Thomas Carlyle Dalton (Westport, Connecticut: Greenwood Press, 1985), 234 pages.**

The title of this book describes its focus somewhat awkwardly. The author is not studying how state politics affects the reform of the judiciary or Congress. He is, rather, looking at how reforms in the criminal justice system, which emanate from these branches, are rendered legitimate (or illegitimate) through the states' political processes. To some extent, however, the title does reflect the bifurcated focus of this work; the reader is getting almost two books for the price of one. The core chapters consist of case studies of the implementation of national reforms of three criminal justice policies as they occurred in four states. The beginning and ending discuss what Dalton terms "legitimation theory" and offer it as the most useful macro-level theory to explain policy-making processes as well as the implementation and political impact of those policies. Each of the focuses is interesting in its own right. However, the connection between the case studies and the overarching theory can be made only speculatively.

The three reforms are: (1) the exclusionary rule in search and seizure which the Supreme Court imposed on the states in its 1961 *Mapp v. Ohio* decision; (2) the *Miranda* warnings preceding custodial police interrogation which stem from the Court's 1966 decision in *Miranda v. Arizona;* and (3) a 1972 amendment to the Omnibus Crime Control Act requiring that the federal government's computerized criminal history (CCH) files, which are available to state criminal justice officers, include case disposition information and that access to or the dissemination of information in the files be restricted. The four states are California, Colorado, Massachusetts and Washington.

Variation in States. Dalton notes that the federal government is increasingly making criminal justice policies which must be implemented by state

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officials. A variety of factors affect states' choices about implementation. Some are the usual ones which are investigated in most policy implementation studies. Ambiguity of policy is frequently noted, especially in regard to the exclusionary rule. (Actually Dalton has confused the rule with the interpretation of the Fourth Amendment; the exclusionary rule is comparatively simple in itself but its existence makes questions and disputes about what constitutes an unreasonable search important.) Another is the differing perceptions of the criminal justice system's priorities held by those occupying positions in the system (basically between the crime control model viewpoint and that of the due process model). Support or indifference on the part of state and local elites is the third factor.

But some factors not often spotlighted are rounded up. Major attention is given to the presence or absence of a structural dimension—that is, whether the policy causes conflict between the branches of state government or among state agencies or whether it significantly alters the formal distribution of authority or responsibility within a state agency. Such conflict dissipates implementation energy, generates different and often conflicting substantive emphases and thus undermines the policy's clarity and legitimacy. It is structural conflict as well as ambiguity which renders the exclusionary rule difficult to implement because it diminishes the police officers' real or working authority and exacerbates court-police conflict. By contrast, Dalton argues, the *Miranda* rules are largely procedural; they require police interrogation to follow certain forms, but have not seriously diminished officers' capacity to fulfill their responsibility (although not all of the author's interviewees support this conclusion). Consequently *Miranda* has been implemented more smoothly and consistently. The effectiveness of the CCH restrictions varied with state modes of implementation. States had considerable discretion in developing their own CCH rules, and those where policymaking was located in a single agency had a more coherent policy, although it was not necessarily enforced more effectively.

Varied pressures by and on implementors in the states also produced different results. In Colorado, a strong district attorneys' association successfully pressured the legislature to make only minimal changes to accomodate the federal CCH restrictions, and to enact a "good faith" exception to the exclusionary rule some years before the U.S. Supreme Court did so. Law enforcement organizations seemed less potent in other states. California has a comparatively strong civil liberties lobby which worked for a broad interpretation of *Mapp* and *Miranda,* especially in the state's courts. In California, however, where Governors Reagan and Jerry Brown

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showed little interest in these policies, the implementation of *Mapp* and *Miranda* policies ended up in the crossfire of a decades-old feud between the conservative state attorney general and the liberal state supreme court. As the Burger Court began placing limits on the applicability of *Mapp* and *Miranda,* the state court relied on the California constitution to expand the spirit of the cases. In a 1982 counterattack, Attorney General Deukmejian was successful in getting the state's voters to adopt Proposition 8, which limited the rules regarding admissibility of evidence in California courts to minimum federal standards.

Very recently both the Colorado and Washington supreme courts began resorting to their state constitutions to evade Burger Court search and seizure decisions. Unlike California, however, there were no high profile state figures who opposed this tack, although local law enforcement agencies often found themselves confused by the conflicting rulings and sometimes tried to ignore those of the state supreme court. Massachusetts' highest court, by contrast, was not interested in exceeding federal standards, but rather would add pro-law enforcement *dicta* whenever it overturned a conviction in which the search or interrogation did not meet such standards. In Washington, the political elite were indifferent to developing CCH access policy which led the police to virtually ignore the restrictions, while in Massachusetts elite interest in the state's CCH policies was undermined by managerial indifference. In Colorado, the CCH restrictions came into conflict with the state cultural norm of accountability—that public records should be accessible to the citizenry.

The case studies are full of valuable material and insights. Those interested in how federalism or different state political configurations affect policy implementation will find many classroom illustrations and researchable propositions in them. However, the author could have summarized his findings and suggestions more succinctly. It is difficult to maintain a mental summary of approximately 72 separate interactions or cells—how half a dozen or so major variables affected the implementation of three separate policies in four different states. A summary chart or a variable by variable summation would considerably aid the reader to follow and evaluate the discussion of the findings.

Legitimation Theory. The author advances legitimation theory as "a general theory of policy-making processes with which to understand the relationships between public policies and American politics" (pp. xx-xxi). It is chosen because most other theories purporting to explain variance in implementation (e.g., utility, systems, communication and cognitive dissonance theories) "explicitly or tacitly advance some conception of political

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legitimacy as a functional necessity for the maintenance of the political system" (p. 18). Because of its central role, legitimacy cannot easily be integrated into other theories as an ancillary factor, but must be treated as a distinctive and central theory. Thus it "is uniquely suited to explain the outcomes of judicial and Congressional reforms in the administration of criminal justice, and potentially in other policy areas as well" (p. 5).

As a political science concept, legitimacy most often refers to the ability of a political system to engender and maintain a widespread belief that its political institutions, processes and basic values are the most appropriate ones for that society. It is a focus on support or its absence at the regime level. A regime lacks legitimacy among those who are culturally or intellectually uncomfortable with its institutions, processes or values. When such people are numerous enough or hold crucial positions in society, the regime is endangered. The Weimar Republic, for instance, disintegrated because many Germans were uncomfortable with democracy. The Shah of Iran was deposed when his modernization policies alienated large segments of the traditional Islamic culture. Dalton develops what he calls a reformation of the concept of legitimacy which generally uses the term in the above manner, but adds some elements. He contends that, despite popular subscription to its institutions, processes and basic values, legitimacy may be lost through a regime's inability to implement or enforce its policies, especially those related to the distribution of justice or the maintenance of economic expectations. He also holds that a legitimate regime must have explicit and accessible processes for adopting and evaluating policy changes.

Dalton suggests that structural and substantive policies (as opposed to procedural ones) are most apt to produce conflicts with regime-threatening implications because they redefine rights and relationships among dominant and subordinate interests and alter institutional roles involving the power to redistribute policy consequences. Thus:

> What is significant about conflicts over criminal justice policy is that they convert problems of social and economic inequality into political issues of rights, thus potentially rechanneling the expression of disaffection toward the constitutional foundations of the political system (p. 184).

Persisting substantive conflicts contribute to the weakening of mechanisms of regime identification such as political parties, while conflicts over structure affect the mechanisms by which authority is justified and support maintained. However, "defects in regime legitimacy do not necessarily result in crises which threaten the stability of the political

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system" (p. 184). Support will be maintained when disaffection caused by one substantive policy is compensated by increased affect stemming from another policy. Policies causing structural conflict are "more problematic" (p. 184). However, Dalton contends that "national policies with structural implications (e.g., separation of powers and federalism) tend to get displaced into conflicts between state [elites] over their policy making authority" (p. 197). This, he implies, is what has happened in the course of implementing the three criminal justice reforms.

Social scientists have not been very interested in or successful at measuring the concept of legitimacy. Only a handful of researchers have investigated public support or acceptance of regimes and their institutions (such as parties or courts) and the measures they used were quite crude. And no one has developed an instrument to measure the impact on regime support of various factors thought to be related to legitimacy, such as governmental abandonment of traditional values, the creation of new political institutions or the inability to maintain an effective system of justice.

Dalton does not discuss the measurement of legitimacy or claim that he or anyone else has empirically linked changes in regime support to developments in criminal justice policy. Of course, the dual focus in the same book certainly implies a connection and the author clearly assumes its existence in the discussion. No doubt *Mapp, Miranda* and the CCH amendment have produced conflict among the elites and the court decisions have done this among the public as well (I doubt that one citizen in 500 knows anything about the CCH restrictions.); but we can only speculate that these conflicts produced or helped produce a deficit in support at the regime level, and if so, how much of a deficit. Indeed, it is not at all clear that a crisis of regime support has taken place recently or is in the offing—or was or is being averted through compensatory displacement. (Nor can it be argued that displacement hides data indicating either a crisis or a linkage. It is a catch-22 to say that the data which prove the existence or cause of a phenomenon are hidden by the same phenomenon.) Put simply, a connection between criminal justice policy changes and regime level support may exist, but no evidence for it is offered here and Dalton's largely unarticulated assumption of its existence is not particularly persuasive. Thus, the book has two focuses rather than one.

Although there is no demonstrable connection between the book's substantive focus and its exploration of legitimation theory, the theoretical discussion has considerable value. The concept of legitimacy has received little social scientific attention in recent years. Dalton makes a good case

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that the concept is important, if not central, to understanding the fate of policy output and ultimately, of course, the fate of political institutions and parties, and even regimes. Virtually no one has approached, even theoretically, policy implementation as a part of the legitimation process—or vice versa. Thus, Dalton's suggestions and propositions as to how they interact can be useful and provocative to other researchers or theorists. His pioneering consideration of the dynamics of subnational influences on the legitimation process is particularly valuable.

Several of his contentions should be researchable once we measure the components of legitimacy with greater sophistication. I will note three briefly: (1) Institutions increasingly deadlocked in conflict over policymaking prerogatives are less likely to advance progressive national policy reforms, due to fear of challenges to their power and legitimacy. Put another way, liberal reforms will occur only when the policies are not likely to lead to structural conflict in their implementation. (2) When policies do produce structural conflict, legitimation problems will be exacerbated. This in turn will enlarge the role of the courts in policymaking. (3) Liberal reformers will be unsuccessful in the criminal justice area if they rely on utilitarian arguments rather than on a rights argument, because the former are more open to rebuttal and less susceptible to legitimation; rights arguments, if skillfully advanced, can aid the legitimation of such policies.

The State Politics of Judicial and Congressional Reform: Legitimizing Criminal Justice Policies is ambitious in scope and rich in material. It offers much to a wide variety of readers: criminal justice specialists, public policy theorists, judicial impact researchers, those interested in federalism and comparative state government, and empirical theorists interested in the concept of legitimacy. Dalton's work gives the reader a sense of both excitement and frustration—excitement because of the comparative microcosmic data on criminal justice policy implementation and the broad and suggestive macrotheoretical legitimation approach; frustration because in this volume the author's ambitions have outrun his capacities.

CASES

Mapp v. Ohio, 367 U.S. 643 (1961).
Mirada v. Arizona, 384 U.S. 436 (1966).

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